

FINAL

**LEBANON ZONING BOARD OF ADJUSTMENT
COUNCIL CHAMBERS, CITY HALL OR
REMOTE VIA VIRTUAL PLATFORM
LEBANONNH.GOV/LIVE
MONDAY, January 3, 2022
7:00 PM**

MEMBERS PRESENT: Chair William Koppenheffer, Vice Chair Mercer, Jeremy Katz, Dan Nash, Dave Newlove, Paul McDonough (Alt),

MEMBERS ABSENT: Jennifer Barkley (Alt)

STAFF PRESENT: Tim Corwin – Senior Planner and Zoning Administrator

1. CALL TO ORDER

The meeting was called to order at 7:02 PM by Chair Koppenheffer.

2. APPROVAL OF MINUTES

Mr. McDonough was given voting privileges for the Minutes.

A. December 6, 2021

***Mr. Nash MOVED to approve the December 6, 2021, Minutes as presented in the January 3, 2022, packet with amendments.
Seconded by Mr. Newlove***

Amendments. Page 1, Line 3; Remove ‘Vice Chair Mercer’ and Add ‘Chair Koppenheffer.’ Page 5, Line 37; correct mute to moot. Page 5, Line 42; Remove ‘the.’ Page 6, Line 4; correct mute to moot.

****The Vote on the Motion was approved (4-0-1).
Vice Chair Mercer abstained because she was absent.***

3. PUBLIC HEARING ITEMS

- A. Cicotte Properties, LLC, 175 Heater Road (Tax Map 64, Lot 30) zoned IND-L:** The property is improved with a non-conforming vehicular sales use. Applicant requests a Special Exception per Section 702.1 of the Zoning Ordinance, or if appropriate, a variance to permit additional parking on the subject property. ZB2021-24-SE - Continued from December 6, 2021

Mr. Nash recused himself and Mr. McDonough was given voting privileges for this hearing.

Johanna Cicotte and Barry Schuster, applicant’s attorney, appeared on behalf of the application. The Zoning Administrator stated that there is a non-conforming vehicular use on the property. The applicant has expanded the parking area for the non-conforming vehicular use and also expanded the paving onto the adjacent property. Tonight, they are only looking at 175 Heater Road, outlined in red on the picture that was presented. The expansion of this parking area requires a variance and the applicant’s special exception is not an appropriate application, as this is an expansion of a nonconforming use. The applicants were notified in October that in order to get relief, the applicant needed a variance. The

applicants have filed both a special exception and a variance. Both applications have been included in the packet.

Ms. Ciotte said she was not aware that paving that portion of the property was not allowed and that she needed to ask for permission to pave it. It has always been used for parking vehicles. The dealership was built in 1985 and it has always been a dealership. The property was re-zoned by the City, and with that, it became a non-conforming use. They made application and the dealership, a non-conforming use, was approved. It has always been the applicant's intention to pave that area at some point because the business is growing. And that property was used for parking all along. She thought the whole property was approved for the non-conforming use.

Staff said if that portion of the property has been used for parking, it is in violation of the Zoning Ordinances and the site plan. The letter to the applicant in October pointed out that the applicant was in violation related to the parking.

Members discussed seeing the original site plan to determine which areas of the property were approved for the non-conforming use. Staff suggested that it is extraordinarily unlikely that grassland parking would have been approved. Staff asked the applicant to confirm the approximate measurement of the new paved area. Instead, Mr. Corwin said his estimated measurements are 47 by 22 feet. Some cars are possibly parked in a setback and parked in an area that is not an approved parking area. The original site plan needs to be reviewed to determine if that area was part of the original approval for a non-conforming use.

Staff explained the differences between the special exception and the variance. The special exception is used to change one non-conforming use to another. But this is an expansion of use and requires a variance. If the original application requested the approval of the grassy parking area, then no applications are required. Staff believes this area was not approved and is therefore an expansion and requires a variance. It is the applicant's burden to provide proof of the original site plan.

The Board discussed if the special exception application should be heard. Chair Koppenheffer said the October letter told the applicants they need to apply for a variance and are in violation. Staff said criteria 801.3C of the ordinance requires that there are no existing violations. There are setback and flood plain violations and the applicants would not be granted with a special exception.

***Mr. Katz MOVED to hear both applications, the special exception, and the variance.
Seconded by Mr. McDonough.***

****The Vote on the Motion was denied. (2-3).***

Mr. McDonough and Mr. Katz voting yea.

Vice Chair Mercer, Mr. Newlove and Chair Koppenheffer voting nay.

Vice Chair Mercer moved to reject the application for special exception application due to the reasons stated, the criteria cannot be satisfied with the violations that are currently in existence. And, that they only hear the variance application.

Seconded by Mr. Newlove.

The motion was withdrawn.

The Board re-voted on the motion made by Mr. Katz, to hear both applications.

Mr. Katz MOVED to hear both applications, the special exception, and the variance.

Seconded by Mr. McDonough.

***The Vote on the Motion was approved. (4-1).**

Mr. Newlove voted nay.

Attorney Schuster referred to sections 702.1 and 702.5 and 703.1. He stated that the paved section of the parking was extended into an area that was already used for parking. It is the paving that has changed. Further, there is an application to the Planning Board to approve a boundary line adjustment to include portions of the adjacent lot which would address any setback violations.

The support statement that was provide refers to all the special exception criteria. Attorney Schuster believes the expansion is of the same nature and kind, it is still the dealership. He reviewed the Findings of Facts and Conclusions of Law they stated in the application.

Chair Koppenheffer asked if they have any documentation showing that this area was approved for parking. The applicants said they would like to get the files if this is an important issue. Staff said the applicant could have provided this information and it is the applicant's burden to obtain proof.

Staff discussed the status of the boundary line adjustment coming before the Planning Board. Lot line adjustments are straight forward and there is no reason to determine that it would not be approved. If approved, it could eliminate the setback issue. The other issue is the expansion to the frontline setback, which could be a problem. The expanded use still needs to be addressed. The key issue is 702.5d, in no case shall a non-conforming use be allowed to expand. If it was previously approved for this use, the applicants would not be making application.

Chair Koppenheffer opened the Public Hearing. No one from the Public spoke and the Public Hearing was closed.

Vice Chair Mercer began a motion and determined it should be prepared prior to reading it. At 7:53 PM the Board took a short recess to draft the motion. The Board reconvened at 8:05 PM. Vice Chair Mercer read the motion again.

Vice Chair Mercer MOVED on December 6, 2021, and January 3, 2022, at duly noticed meetings of the Lebanon Zoning Board of Adjustment, there appeared Barry Schuster, Esq., and Johanna Cicotte on behalf of Cicotte Properties, LLC, regarding 175 Heater Road (Tax Map 64, Lot 30), zoned IND-L. The property is improved with a non-conforming vehicular sales use. Applicant requests a Special Exception per Section 702.1, 702.5 and 703.1 of the Zoning Ordinance. ZB2021-24-SE

I. FINDINGS OF FACT

Based on testimony given, application materials presented, and supporting documents submitted, the Lebanon Zoning Board of Adjustment makes the following findings of fact:

1. The subject property is improved with a non-conforming vehicular sales use. In early October, City staff discovered that a substantial amount of new impervious surface has been added to the property in violation of the Zoning Ordinance and Site Plan Review Regulations (staff roughly estimates approximately 6,000 sq. ft. of new impervious surface).
2. The property was originally developed in the mid-1980s with an approved site plan for what at the time would have been a lawful conforming use under the ordinance. The Board infers that the

unpaved area was intended to be undeveloped under the site plan and the applicant presented no evidence that parking was an approved use of that area.

3. The Planning and Development Department issued a Notice of Violation on October 18, 2021, citing violations of the Zoning Ordinance (in addition to violations of the Site Plan Review Regulations and Chapter 74 of the City Code) as follows:

“The newly paved surface adjoining the existing parking area of the car dealership on the subject property constitutes an impermissible expansion of a non-conforming use into an area of the lot that was not previously occupied by the non-conforming use at the time the use became non-conforming. As such, the newly paved surface on the property is in violation of Section 702.5.D, and Section 303.2 of the ZO.

The installation of the newly paved surface on the subject property also constitutes violations of the following Sections of the ZO:

- **Section 303.3** – The pavement extends to and across the lot line shared with 30 Heater Road whereas structures are required to be set back a minimum of 20 ft. in the IND-L District (unless the pavement is to be used as a parking area or driveway in which case a minimum setback of 5 ft. applies per Section 201.7 of the ZO).
- **Section 402.2** – The subject property is located in the Floodplain District overlay per Section 402 of the ZO. Section 402.2 of the ZO requires compliance with Chapter 74 (“Flood Damage Prevention”) of the City Code. Section 74-14 of Chapter 74 requires that a floodplain permit shall be obtained “before construction or development begins within any area of special flood hazard[.]” Staff has verified that no Floodplain Permit has been issued for the installation of the paved area and, therefore, is out of compliance with Chapter 74. Consequently, the property is in violation of Section 402.2. of the ZO.
- **Section 901.1.D** – Staff has verified that that no Zoning Permit has been issued for the pavement as is required by Section 901.1.D of the ZO.

In order to remedy the violations of Sections 702.5.D, 303.2, and 303.3 of the ZO, you will need to apply to the ZBA for a Variance to allow the expansion of the non-conforming vehicular sales use and to allow the pavement to encroach into the minimum required side yard. As part of your application to the ZBA, you will need to provide a site plan showing:

- The boundary lines of the property;
- The location of all structures on the lot showing building setbacks to all property lines;
- The location of natural features on the property including but not limited to jurisdictional wetlands; and
- Any other prominent features of the lot that will assist you in explaining why you need relief from the Zoning Ordinance.”

3. On November 4, 2021, the Planning and Development Department received an application to the Zoning Board requesting a Special Exception per Section 702.1 of the Zoning Ordinance to change one non-conforming use to another non-conforming use. A boundary line adjustment plan was provided on November 29, 2021. In the application materials, the applicant also states that,

“To the extent a variance is required for any of these requests, Cicotte Properties, LLC will be prepared to address that as well.”

4. Section 702.1 of the Zoning Ordinance states, in part: “A non-conforming use may, as a Special Exception, be changed to another non-conforming use provided that the Board of Adjustment shall find that the proposed use is equally appropriate or more appropriate to the district than the existing non-conforming use.” In order to grant a Special Exception to change one non-conforming use to a different non-conforming use, the applicants must demonstrate that the proposal meets the general Special Exception criteria set forth in Section 801.3, in addition to the Section 702.1 criteria.
5. No one from the Public spoke for or against this application.

II. CONCLUSIONS OF LAW

As a result of the above findings of fact and based on testimony given, application materials presented, and supporting documents submitted, the Board concludes the following with respect to the Special Exception criteria set forth in §801.3 of the Zoning Ordinance:

1. The Special Exception is not authorized by Section 702.1, 702.5 or 703.1 of the Zoning Ordinance. (Section 801.3.A). The applicant proposes to enlarge the parking on the property.
2. The following condition/requirement of §702.1 **is not** met: (Section 801.3.B)
 - a. The proposal is for an expansion not a change. Section 702.5 dictates they cannot be allowed to expand into property not used by the existing non-conforming use. As well as Section 703.1A2 states the property cannot be rendered proportionately less adequate.
3. There **are** existing violations of the Zoning Ordinance on the property that the granting of the Special Exception would not remedy. (Section 801.3.C) According to the Zoning Administrator, the property is currently in violation of Section 303.3, Section 402.2, and Section 901.1.D of the Zoning Ordinance.
4. The character of the area **will not** be adversely affected. (Section 801.3.D)
5. **No** hazard or nuisance will be created. (Section 801.3.E)
No evidence was offered to suggest otherwise.
6. The capacity of existing or planned community facilities and services (including streets and highways) **will not** be adversely impacted. (Section 801.3.F)
7. The granting of the Special Exception **will not** result in undue municipal expense. (Section 801.3.G)
8. The proposed Special Exception **will not** be developed in a manner compatible with the spirit and intent of the ordinance if the Special Exception were to be granted. (Section 801.3.H)
9. The general welfare of the City **will** be protected by not granting the Special Exception. (Section 801.3.I)

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this 3rd day of January 2022, hereby **DENIES** the request for a Special Exception, as set forth above and per testimony, plans, and materials submitted.

Seconded by Mr. Newlove.

Mr. Katz proposed three clarifications to the Motion, and they are contained in the above motion. All were acceptable to Vice Chair Mercer and Mr. Newlove.

****The Vote on the Motion was approved. (5-0).***

Attorney Schuster then addressed the application for a variance. This property was approved for a dealership in the 1980s. He reviewed the terms of their application. The additional expansion of the paving would meet the needs of the public. There would not be a negative impact on the area. This is a small enlargement of a parking area where it was always used for these purposes. It is a hardship because the dealership was originally an approved use, and the current zoning deprives the property of its normal expansion. It is a small but important use of the land for the business. It is reasonable to have some extra parking because it was once permitted and with the changes to the zoning it is no longer allowed. They are willing to have the approval contingent on the Planning Board's approval of the boundary line adjustment. Staff and the Board discussed what sections of the zoning ordinance need approval with this variance.

Members questioned if the existing application is adequate and determined that three sections are not complete. The purpose of notification of a hearing is to inform the public and to allow them an opportunity to know that additional property would be included.

***Ms. Mercer MOVED to continue the hearing until the February meeting.
Seconded by Chair Koppenheffer.***

****The Vote on the Motion was approved. (3-2).***
Mr. Newlove and Mr. Katz voted nay.

Mr. Nash returned to the meeting.

- B. Cote Swenson & Samantha Medina, 397 Dartmouth College Highway (Tax Map 111, Lot 9), zoned RL-2:** Applicants request a Special Exception per Section 313.2 of the Zoning Ordinance to convert the existing contractor's yard use to a produce stand use. **ZB2022-01-SE - Postponed at the request of the applicant. Once rescheduled, the new hearing date will be readvertised and renoticed to abutters.**
- C. Chorro, LLC, 77 Bank Street (Tax Map 92, Lot 79), zoned R-O:** Applicant requests a Special Exception per Sections 311.2 and 601 of the Zoning Ordinance to convert the existing building to an 8-unit multi-family dwelling, and a Variance from Section 311.3 to allow 8 dwelling units where 5 dwelling units is the maximum allowed based on the size of the property. **ZB2022-02-SEVAR**

Mr. Katz recused himself from this hearing and Mr. McDonough was given voting privileges.

Jim Wasser, architect, Studio Nexus and Tim Sidore of Execu Suite appeared on behalf of the application. Staff noted that the special exception is not necessary due to the underlying density for the zoning district that must be met. This is simply a variance, because the special exception cannot be applied for because the density has not been met.

This is an existing property at 77 Bank Street. It is an office building with an apartment on the top floor. The applicant would like to downsize the office on the first floor, add 3 units on the second floor, and add 4 units, two on each floor in the barn. That would be a total of 8 units plus the first-floor office. They believe smaller sized housing is in demand in the Upper Valley and they would like to create this number of units instead of redeveloping it into a smaller number of larger units, using the same square footage. Their narrative addressed the criteria of a variance. The parking area would not change, and the number of occupants would be the same if the units were larger and fewer. The property is adjacent to a building with 43 small dwelling units that is also owned by the applicant. It is the same owner, but a different single owner LLC.

The hardship of the property was discussed. Financial considerations do not qualify as a hardship. The value of the property will go up with more units. The Board asked if a boundary line adjustment between the two properties could be done and then a variance would not be required. Staff said technically there could be room at the Bank Street property depending on the permitted density of that property.

Ms. Mercer asked for clarification about the uniqueness of the property that causes the hardship. The applicants responded that when they were looking at ways to divide up the existing building, they determined that there is not a need for office space. Specifically, the second floor and the barn are not viable as office space. The building was more suitable for housing for which there is a need in Lebanon. They feel they are continuing the use similar to the adjacent building and keeping the nature of the area. They hope to optimize its residential capacity.

Staff followed up that there is adequate room to do a property line adjustment to permit the housing. Chair Koppenheffer asked what is unique about the property to similar situated properties. He recalled there are very few single-family homes in this area, it is business and multi-family housing. The City determined that the number of units they are requesting requires more land.

Chair Koppenheffer opened the Public Hearing.

Mr. Jeremy Katz appeared, saying although he is not a direct abutter, he previously owned this building. He believes he has unique knowledge. The barn was always vacant, and the 2nd floor office space was nearly always unrented. Where there is a dog leg in the property there is a steep drop off to the level of the old junior high. At one time a piece of the property was conveyed to the School Administration. If not for that altruistic conveyance, there would be enough property for the number of units being requested. Absent the steep slope of that corner, which is not developable, they would not need a variance. Further the large barn building cannot be developed in a reasonable way without a variance. It may be possible to ask the School Administration to convey the land back. Mr. Katz responded that the sloped land is not able to be used for any other purpose due to the slope. If it were not a severe slope on that land, they would have adequate land for the number of units they are requesting.

Sarah Chamberlain appeared saying the property in discussion is kind of a buffer between them and the 43-unit building. They are concerned that the area would look more like a business parking lot. They do not believe that waste management has been addressed. Also, in the past, there has been unspoken access to their backyard. They have been able to drive down that driveway to access their backyard for construction purposes.

The applicants said waste disposal would be handled on the 75 Bank Street property. Staff said technically that would not be permitted.

Hearing no one else from the Public, the Public Hearing was closed.

Mr. Nash MOVED on January 3, 2022, at a duly-noticed meeting of the Lebanon Zoning Board of Adjustment, there appeared Jim Wasser, architect, Studio Nexus and Tim Sidore of Execu Suite, regarding 77 Bank Street (Tax Map 92, Lot 79), zoned R-O. Applicant requests a Special Exception per Sections 311.2 and 601 of the Zoning Ordinance to convert the existing building to an 8-unit multi-family dwelling, and a Variance from Section 311.3 to allow 8 dwelling units where 5 dwelling units is the maximum allowed based on the size of the property. ZB2022-02-SEVAR

I. FINDINGS OF FACT

Based on testimony given, application materials presented, and supporting documents submitted, the Lebanon Zoning Board of Adjustment makes the following findings of fact:

1. The property is improved with a mixed-use building containing office space and one dwelling unit. The applicant proposes to convert the building to an eight (8) unit multi-family dwelling.
2. A conversion of a building to a multi-family dwelling is allowed by Special Exception in the R-O District provided that the conversion complies with the requirements set forth in §601 (“Special Design Standards”). Here, the applicant is unable to comply with at least one of the §601 requirements; specifically, §601.4 which requires compliance with the applicable density requirements.
3. Per §311.3, in order to accommodate the proposed 8 dwelling units, the lot would need to be at least 28,000 sq. ft. in size, whereas the lot is only 21,200 sq. ft. in size). Therefore, the proposed multi-family conversion is ineligible for a Special Exception per §601 and instead requires a Variance from §311.2 (the R-O District table of permitted uses).
4. To obtain the requested Variance from §311.2, the applicant must demonstrate compliance with each of the five variance criteria as set forth in §801.2 of the Zoning Ordinance and NH RSA 674:33, I(b).
5. Jeremy Katz, previous owner of the property, testified about characteristics of the property.
6. Sarah Chamberlain, neighbor at 79 Bank Street, expressed concerns about the increased intensity of use and the dumpster.

II. CONCLUSIONS OF LAW

As a result of the above findings of fact and based on testimony given, application materials presented, and supporting documents submitted, the Board concludes the following with respect to the Variance criteria set forth in Section 801.2 of the Zoning Ordinance:

1. The variance **will** be contrary to the public interest. (Section 801.2.A.1)

Density is regulated by square footage.
2. The spirit of the ordinance **is not** observed. (Section 801.2.A.2)

3. Substantial justice **is not** done. (Section 801.2.A.3)
4. The values of surrounding properties **are not** diminished. (Section 801.2.A.4)
5. Literal enforcement of the provisions of the ordinance **would not** result in an unnecessary hardship.

The Property is adjacent to a parcel owned by a related owner whereby a boundary line adjustment could be created to meet the density requirement.

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this **3rd day of January 2022**, hereby **DENIES** the requested Variance as set forth above and per testimony, plans, and materials submitted.

Seconded by Vice Chair Mercer.

****The Vote on the Motion was unanimously approved (5-0).***

Mr. Katz returned to the meeting.

4. STAFF COMMENTS

5. ELECTION OF OFFICERS

A. Chair and Vice Chair

Mr. Nash nominated Chair Koppenheffer for another term.
Seconded by Vice Chair Mercer.
All were in favor.

Mr. Nash nominated Vice Chair Mercer for another term.
Seconded by Mr. Newlove.
All were in favor.

6. ADJOURNMENT

Mr. Nash MOVED to adjourn the meeting at 9:15 PM.

Seconded by Mr. Katz.

****The Vote on the Motion was unanimously approved (5-0).***

Respectfully submitted,
Linda Billings
Recording Secretary